No. 225

In the Supreme Court of the United States

October Term, 1922.

WABASH RAILWAY COMPANY, *Petitioner,*

vs.

MILES ELLIOTT, *Respondent.*

On Writ of Certiorari to Kansas City Court of Appeals, State of Missouri.

BRIEF FOR RESPONDENT.

GEORGE H. KELLY,
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Counsel for Respondent.

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Cases Cited.

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BRIEF FOR RESPONDENT.

No. 648.

STATEMENT.

On January 11, 1919, respondent filed in the Circuit Court of Livingston County, Missouri, the county in which he resided, an action against the Wabash Railway Company for the recovery of an attorney's fee or compensation, and afterwards,

on March 7, 1919, filed an amended petition in that action adding the Director General of Railroads as a defendant. This action was a suit for the amount of four thousand one hundred sixty-two dollars and eighty-five cents ($4,162.85) due respondent under the attorney's lien statute of the state of Missouri (Sec. 691, R. S. Missouri 1919), which is as follows:

> "Sec. 691. *Attorney May Contract for Percentage of Proceeds of Claim—Notice of Lien to Be Given to Defendant.* In all suits in equity and in all actions or proposed actions at law, whether arising *ex contractu* or *ex delicto*, it shall be lawful for an attorney at law, either before suit or action is brought or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action and upon the proceeds of any settlement thereof for such attorney's portion, or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the

> parties either before suit or action is brought or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall after notice, served as herein provided, in any manner, settle any claim, suit, cause of action or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the writen consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client."

While respondent did designate his action against the Wabash Railway Company a motion and filed it at the foot, so to speak, of the original suit of *Bessie G. Welker, Administratrix, plaintiff, v. Wabash Railway Company, defendant,* and did refer to himself as a movent and petitioner, nevertheless petitioner contended, and vigorously, that there was no authority under the attorney's lien statute of Missouri for a proceeding by motion to enforce an attorney's lien where the settlement complained of was made before judgment (as here) and cited a decision of the Supreme Court of Missouri in *Mills v. Met. St. Ry. Co.*, 221 S. W. 1, holding to that effect. The Kansas City Court of Appeals held, and rightly, that respondent's case was like the Mills case and that respondent's suit was an independent action and that while the designation of the action as a motion "might indicate that it was a proceeding in the original case, an understanding of all the

facts in the proceeding would indicate otherwise." (Rec., p. 6.)

Respondent's action resulting in the judgment here involved was in fact an independent action and the impression sought to be created by petitioner's statement that it was merely a motion or intervention in the original suit is at least misleading.

The Pleaded Issues.

The pleading on which respondent tendered the issues was entitled "Amended Motion to Enforce Attorney's Lien." It was treated by the Missouri courts as a petition or complaint seeking a money judgment. In said pleading it was alleged that on the 17th day of May, 1918, Bessie Welker, personal representative of her deceased husband, entered into a contract with respondent as an attorney-at-law, "to investigate, settle, adjust, compromise or bring suit" upon a certain alleged cause of action against the petitioner. It was further agreed that respondent's compensation would be one-half of the amount recovered upon the claim, whether by suit, compromise, or settlement. (32.) It was further alleged that on the 23d day of May, 1918, respondent served a notice on the Wabash Railway Company advising it of respondent's contract and its terms (33); that notwithstanding such notice defendant, without the knowledge or consent of respondent, negotiated a settlement with Mrs. Welker by which petitioner agreed to pay and did pay to Mrs. Welker the sum

of $4,162.85 and also agreed to pay a like amount to respondent as his attorney's fee (33-34); that petitioner entered into an agreement with plaintiff for the dismissal of her said action in fraud of respondent's rights and that petitioner fraudulently failed to put into its release the agreement that petitioner would pay respondent's attorney's fee (33).

Answer.

In response to said motion, petitioner *voluntarily* filed its separate answer, generally and specifically denying the allegations of said motion (36-37). (The answer also urged two objections to the jurisdiction: (a) That Mr. McAdoo was operating the petitioner's railroad at the time Mrs. Welker's husband was killed; (b) That Mrs. Welker, *not respondent*, lived in Shelby County and that her husband also lived there at the time of his death.)

Reply.

Respondent filed a reply which was a general denial (39).

Trial.

Petitioner appeared at the trial at the January, 1920, term of the Circuit Court of Livingston County, Missouri, and the parties having waived

a jury, at the conclusion of the evidence the court rendered a judgment containing the recital:

> "Now at this day this cause coming on for final hearing and determination by the court, the court having heretofore heard the evidence herein and being now fully and sufficiently advised in the premises *doth find the issues herein in favor of Miles Elliott* * * * against defendant Wabash Railway Company, in the sum of four thousand one hundred sixty-two dollars and eighty-five cents." (39.)

From this judgment petitioner prosecuted an appeal to the Kansas City Court of Appeals which court on May 23, 1921, finding no error of law in the record of the trial court, and having no jurisdiction to disturb its finding on the facts (*Mytton* v. *Ry.*, 211 S. W. 111; *Quisenberry* v. *Stewart*, 219 S. W. 625) in all things affirmed the judgment (R. 3).

Notwithstanding it knew that the Supreme Court of Missouri, under the peculiar practice of that state, had no jurisdiction on *certiorari* to review the record, petitioner, on July 27, 1921, filed its petition for *certiorari* in said court rather than this (R., p. 113), which petition was denied on October 29, 1921. It does not appear from the record when the petition for *certiorari* was filed in this court, but a copy of same served on respondent discloses that it was verified on December, 1921, *more than six months after the judgment of the Court of Appeals became final.* (*Ry. Co.* v. *Cliff*, 43 S. C. R. 126).

Notwithstanding the rule that "This court has repeatedly held that in cases coming to it from the Supreme Court of a State, it accepts as binding the findings upon issues of fact duly made in that court" (*Miedrich* v. *Lauenstein*, 232 U. S. 236, l. c. 243), we shall briefly refer to the facts in evidence on which the judgment was founded as shown in the record before the Kansas City Court of Appeals.

Merne G. Welker was a brakeman in the employ of the Wabash Railway Company on the 2d day of April, 1918, and was killed by reason of its negligence at Shenandoah, Page County, Iowa, on said date. His widow was appointed administratrix of his estate by the Probate Court of Shelby County, Missouri. Thereafter she as such administratrix entered into a contract with the respondent Miles Elliott, by virtue of which he became her attorney as administratrix, and agreed to represent her as such in the prosecution of her claim for damages against the Wabash Railway Company on account of the death of her husband. The contract is shown on page 28 of the record. The contract was executed on May 17, 1918. By this contract it was agreed that respondent should receive fifty per cent of any and all amounts that might be recovered on account of the death of Merne G. Welker, whether recovered by suit, compromise, settlement or judgment.

On the 23d day of May, 1918, respondent caused the sheriff of Livingston County to serve a notice on the Wabash Railway Company of the

lien upon the cause of action created by such contract and its terms. Thereafter respondent prepared and filed a petition in the Circuit Court of Livingston County on June 5, 1918, praying for damages against the Wabash Railway Company, the then sole defendant. At the January term, 1919, the following stipulation was filed by *defendant's counsel acting for defendant* in said court and cause (8-9):

> "In the Circuit Court of Livingston County, Missouri. To the.....Term, 1918.
> Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, Deceased,
> vs.
> Wabash Railway Company.
> The subject-matter of the above entitled suit having *been fully settled between the parties hereto*, it is hereby stipulated and agreed that said suit be dismissed at defendant's cost.
>
> BESSIE G. WELKER,
> *Administratrix, Estate of Mern G. Welker, Deceased, Plaintiff.*
>
> WABASH RAILWAY COMPANY,
> *Defendant.*
>
> By C. G. WILLIAMSON,
> *Its Counsel.*"

Three days thereafter the respondent filed a motion to enforce his attorney's lien. Thereafter, and at the same term, the respondent filed an amended motion to enforce attorney's lien. By this amended motion the Director General of Railroads was made a party defendant and sum-

mons issued, and on the same day the Wabash Railway Company filed its separate answer to the amended motion.

By this answer the Wabash Railway Company sought to contradict the return of the sheriff and claimed that the Director General was operating said railroad at the time of the injury. One paragraph of defendant's answer was characterized as in the nature of a plea in abatement to the jurisdiction of the court, specifically setting up that certain orders of the Director General deprived the court of jurisdiction, but not otherwise questioning the jurisdiction. It further denied that it made any settlement of the action, or that it had any knowledge of any contract between the plaintiff and the respondent, and added a general denial.

At the trial it was admitted that the appellant is a duly licensed and practicing attorney at law, and that the contract and paper marked Exhibit 1 herein contains the genuine signature of Bessie G. Welker and the genuine signature of Miles Elliott. It was also admitted that Bessie Welker was the duly appointed administratrix of the estate of Merne G. Welker. It was further agreed that respondent had no information or knowledge of the making of the settlement alleged in his motion until long after same had been made and until after payment had been made thereon, and that respondent did not give his consent to such settlement. There was no objection made, either in the answer or at the trial, to the court's proceeding on the motion, and no question raised as to the method of procedure. In fact, both parties and the

court proceeded throughout upon the theory that the method of procedure was correct and proper.

The petition and summons with the return thereof disclose that the petitioner Wabash Railway Company was duly summoned on the 10th day of June, 1918, and also the sheriff's return shows that petitioner was notified of respondent's contract on the 24th day of May, 1918. The sheriff's return as to the notice is as follows (R., p. 47):

"RETURN.

Served the above notice on the Wabash Railway Company in Livingston County, Missouri, on the 24th day of May, 1918, by leaving a true copy of the same at the business office of said railway company in Chillicothe, Missouri, with W. R. Stepp, the agent and person in charge of said office, and I hereby certify that the president or other chief officer of said railway company could not be found in my county.

JAMES J. BROWN, *Sheriff*."

The summons is as follows:

"ORIGINAL WRIT.

State of Missouri, County of Livingston—ss.

The State of Missouri to the Sheriff of Livingston County, Greetings:

We command you to summon Wabash Railway Company, a corporation, to be and appear in the Circuit Court of Livingston County, before the judge thereof, on the first day of the next term of court to be begun and held at the court house, in the city of Chillicothe, in Livingston County, on the first Monday in

September, at 8:30 a. m., 1918, it being the 2d day of September, A. D. 1918, to answer the petition of Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, and have you then and there this writ, with the manner in which you executed the same.

In Witness Whereof, I, Byrd L. Hamblin, clerk of said court, hereunto set my hand and affix the seal of said court at my office in Chillicothe, this, the 5th day of June, A. D. 1918.

(Seal) DREW P. TYE, *Clerk.*"

The sheriff's return is as follows (48):

"SHERIFF'S RETURN.

Served the within summons in Livingston County, Missouri, on the 10th day of June, 1918, by leaving a true copy of the within writ, with a copy of the petition thereto attached, as furnished by the circuit clerk of Livingston County, Missouri, with W. R. Stepp, agent of the Wabash Railway Company, the within named corporation, defendant, at the office of the defendant in Chillicothe, Livingston County, Missouri, the said W. R. Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, Missouri, the president or other chief officer not being found in my county.

JAMES J. BROWN,
Sheriff of Livingston County, Missouri.

Fee $1.00.
No. 22757.
Filed June 10, 1918.
DREW P. TYE, *Circuit Clerk.*"

The record of the court showing the filing of a stipulation for dismissal filed on January 6, 1919, in case of *Bessie G. Welker, Administratrix, Plaintiff*, v. *Wabash Railway Company, Defendant*, recites:

> "Stipulation for dismissal *filed by defendant through its counsel.*"

The stipulation itself so filed was introduced in evidence without objection. The stipulation recited that the subject matter of the above entitled suit having been fully settled *between the parties hereto, it is hereby stipulated and agreed that said suit be dismissed at defendant's costs.*

The plaintiff Bessie Welker Hampton (whose name was changed by marriage) gave her testimony by deposition in the cause and testified to retaining Mr. Elliott and entering into a contract with him for his fees. She further testified that she received four thousand dollars ($4,000.00) from the defendant in settlement of the law suit through Mr. Williamson, whom she described as the claim agent of the Wabash Railway Company. Mr. Williamson told Mrs. Welker at the time he gave her the bank draft that the four thousand dollars ($4,000.00) was hers and that he would pay the lawyers. He asked plaintiff about the terms of the contract and what part of the proceeds was to go to her lawyer. Mrs. Welker advised him that she had agreed with her lawyer to pay him fifty (50) per cent, and when plaintiff advised Mr. Williamson that the attorney was to get one-half, Mr. Williamson said he would pay

the attorney. He further advised her to put the draft in the bank and use the money as her own. He further told her that the money was her own; that he would pay the lawyers and that she should not divide up the money or anything like that. He further agreed to pay the funeral expenses, which amounted to $162.85. She signed a release of her claim or cause of action at the time she received the four thousand dollars ($4,000.00).

Her testimony in part follows:

"Q. You may state whether or not you ever received anything from the Wabash Railroad Company or anybody representing that road in settlement of your law suit? A. I received $4,000.00.

Q. And from whom did you receive $4,000.00? A. Mr. Williamson, claim agent.

Q. Do you know Mr. Williamson's initials? A. C. D.

By Mr. Jones: It is 'C. G.'

* * * * * *

Q. Who is Mr. C. G. Williamson? A. Claim agent for the Wabash Railroad.

* * * * * *

Q. Now, when he paid you, in what form was this payment made? A. Bank draft.

* * * * * *

Q. And what did Mr. Williamson say at the time, if anything, concerning your attorney, Mr. Elliott? Did Mr. Williamson, the claim agent, say anything about Mr. Elliott's compensation to you? A. No. I don't understand what you mean, I suppose.

* * * * * *

Q. What did you tell him about what part of the proceeds would go to your lawyers? A. I told him 50 per cent.

A. He said he would pay the lawyers, the attorneys.

Q. And what did he say about the amount that you received as to what should be done with it? A. Said I should put it in the bank and use it as my own.

Q. In your own language, state what it was that he said about that $4,000.00 when he gave it to you, in your own way; that is, as to whether it was your lawyer's, your own, or whose it was. * * * A. He said it was my own and that he would pay the lawyers; that I shouldn't divide it up or anything like that.

* * * * * *

Q. Mrs. Hampton, what, if anything, in addition to the $4,000.00 did the claim agent agree to pay? A. He agreed to pay the funeral expenses.

Q. And did he? A. He did.

Q. How much were they? A. $162.85.

Q. You may state whether or not you signed a release of your claim or cause of action at the time you were paid this $4,000.00. I will withdraw that question. You may state whether or not you signed any papers. A. I did.

Q. And about how many? A. One.

Q. And do you know what that paper was? A. I don't.

Q. Would it refresh your recollection any if I would call your attention to the fact that it was a release or something of that nature? A. What I supposed it to be.

Q. Did you read it? A. No, I didn't.

Q. You just signed whatever paper he gave you? A. Yes.

Q. Well, what did he represent it to be; what did he tell you it was? A. I suppose it was a release; I don't know what he told me it was. I don't believe he even told me."

For the purpose of showing notice to the defendant of the pendency of the suit of the administratrix, the deposition of Roy Floyd, taken on the 27th day of June, 1918, was introduced. The defendant appeared by Mr. Jones, its counsel, "for the sole and only purpose of objecting to the taking of depositions on the part of plaintiff in *pursuance of the notice heretofore served upon defendant*," for the reason that the Circuit Court of Livingston County, Missouri, had no jurisdiction over the defendant on the ground that plaintiff was a non-resident, having been appointed by the Probate Court of Shelby County, Missouri, and that the cause of action accrued in the state of Iowa. That is to say, the objection to the taking of depositions *conceded that the appellant had been served with notice* and that the *only objection* to the taking of depositions was based upon the orders of the Director General. The testimony of the witness Floyd disclosed that the administratrix had a meritorious cause of action and that both he and deceased were employed by the appellant The Wabash Railway Company at the time of the injury to deceased.

The defendant orally demurred to respondent's evidence and the demurrer was overruled. Ap-

pellant sought by the testimony of one W. R. Stepp to contradict the return of the sheriff. The court, referring to the decision of the Supreme Court in *Smoot* v. *Mudd*, 184 Mo. 508, declined the offer on the ground that in the absence of fraud the return of the sheriff was conclusive.

Exhibit 4 was introduced in evidence over the objection of respondent, in which it was recited that in consideration of the sum of four thousand dollars ($4,000.00) paid to her the plaintiff agreed to release said Director General of Railroads *and the Wabash Railway Company* from all claims and demands at common law or under the laws of any state, or the United States, which she had against them by reason of injuries received by her husband on the date of his death.

Mr. Williamson testified that he was in the employ of the United States Railroad Administration from December 27, 1917, and claimed that he represented the United States Railroad Administration in effecting this settlement. He sought to explain why the stipulation was signed by the Wabash Railway Company, but did not succeed. His testimony contradicted that of Mrs. Welker. He admitted that the settlement was made after the suit was instituted and notice served on the petitioner, to-wit, on the 16th day of November, 1918. The stipulation was prepared by Mr. Brown, who was attorney both for the Director General and for the *Wabash Railway Company*. The stipulation was forwarded to Mr. Brown either by the appellant or by the railroad administration. Defendant introduced Orders

Nos. 18, 18a and 50, issued on April 9, 1918, April 18, 1918, and October 28, 1918, respectively, by the Director General of Railroads. At the conclusion of the evidence its counsel orally asked the court to declare that the finding and judgment should be against both the Wabash Railway Company and Director General, which was overruled.

Mr. Williamson was recalled by petitioner's counsel and sought to contradict the testimony given by plaintiff, but admitted that she told him that respondent was representing her. He claimed that he did not know there was any claim pending against the defendant, and the court thereupon interrupted and asked him what he meant by his testimony that the stipulation of dismissal was entitled as it was because the case was docketed under that name in the office of the United States Railroad Administration. He admitted that he was connected with the claim department of the Wabash Railway Company and the Director General from June until November, 1918. He admitted that he knew of respondent's contract concerning the suit long before the settlement was made when he first investigated the case just after the suit was filed. He admitted that the plaintiff asked him in the presence of Judge Maupin if she could use that money and admits that he did not tell her that she would be required to pay her counsel. The stipulation for the dismissal of the case was signed at the same time the agreement of settlement was signed and the check delivered.

BRIEF OF THE LAW.

I.

The jurisdiction of the Circuit Court of Livingston County, Missouri, over the independent action instituted by respondent by motion and asserted by respondent against petitioner in that court was not dependent upon whether or not the court had jurisdiction over the suit of Bessie G. Welker, Administratrix, against petitioner.

Gilham v. *Railway*, 282 Mo. 118.
Mills v. *Ry.*, 221 S. W. 1.
Elliott v. *Wabash Ry. Co.*, 208 Mo. App. 348.

II.

Respondent's motion to enforce his lien alleged every fact essential for an independent cause of action. Petitioner *voluntarily* appeared and by the last four paragraphs of its separate answer to said motion (36-37) generally and specifically denied the allegations of the motion and to this answer respondent filed a reply which was a general denial (39). On the issues so joined the court sitting as a jury found the issues in favor of plaintiff and against the petitioner, after a trial in general conformity to the rules and usages governing the trial of civil actions at law and was due process of law, since the real purpose of the motion was not to revive a dead law suit, but to

establish a monetary judgment for the value of his lien and therefore respondent's independent action cannot be treated as a mere intervention by this court, since the Missouri Court did not so treat it.

Gilham v. *Ry.*, 282 Mo. 118.
Elliott v. *Wabash Ry. Co.*, 208 Mo. App. 348.

III.

Respondent's action grew out of the act of petitioner in making a settlement of the suit of Bessie Welker against petitioner in fraud of the rights of respondent, and not out of any act of the Director General of Railroads, and for said reason respondent's rights were not affected by the provisions of General Order No. 50 of said Director General, as his rights against petitioner were well settled by a long course of decisions construing the Missouri Attorney's Lien Act.

Sec. 691 R. S. 1919.
Mytton v. *Ry.*, 211 S. W. 111.
Mytton v. *Ry.*, 198 S. W. 189.
Boyd v. *Company*, 135 Mo. App. 115.
Kammerer v. *Ry.*, 211 S. W. 687.
Curtis v. *Ry.*, 118 Mo. A. 341.
Curtis v. *Ry.*, 125 Mo. A. 369.

IV.

This court will follow the decisions of the courts of the state construing the Attorney's Lien Act.

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349.

V.

Respondent's cause of action against petitioner accrued when it made the settlement with the administratrix and the fact that later decisions of the court may have disclosed that the administratrix had no cause of action against petitioner, does not relieve it of liability to respondent for that portion of the proceeds of the settlement retained by it and which it contracted to pay to him.

Anson on Contract, pp. 75-77.
12 C. J., pp. 324, 326, 327.
Livingston v. *Dugan*, 20 Mo. 102.
Wood v. *Telephone Co.*, 223 Mo. 537.
San Juan v. *St. John's Gas Co.*, 195 U. S. 510.
Fire Ins. Assn., Ltd. v. *Wickham*, 141 U. S. 564.
Hennessy v. *Bacon*, 137 U. S. 78.
Bofinger v. *Tuyes*, 120 U. S. 198.
Northern Liberty Market Co. v. *Kelly*, 113 U. S. 199.
Jeffries v. *New York Mut. L. Ins. Co.*, 110 U. S. 305.
St. Louis v. *U. S.*, 92 U. S. 462.
U. S. v. *Child*, 12 Wall. 232.
Union Bank v. *Geary*, 5 Pet. 99.
12 C. J., pp. 329, 330.

VI.

Petitioner, the administratrix and respondent in good faith believed that by virtue of the previous decisions of the Missouri and other courts construing the orders of the Director General of Railroads, that the action which petitioner settled was

a valid one and therefore under well settled principles it was not essential to respondent's right to recover that he should have proved that the action settled by defendant was valid in the sense that a recovery could be had thereon.

(Authorities *supra.*)

VII.

The return of the sheriff showing service of the notice of respondent's lien on petitioner, as well as service of summons upon it, was conclusive upon the courts of the State, as it was not impossible that the person on whom service was had could have been in the employ of both petitioner and the Director General of Railroads.

Miedrich v. *Lauenstein*, 232 U. S. 236.
Vicksburg S. & P. Ry. Co. et al. v. *Anderson Tully Company*, 256 U. S. 408.
Smoot v. *Judd*, 184 Mo. 508.
Walker v. *Rollins*, 14 How. 584.

VIII.

The finding of the trial court, sitting as a jury, is conclusive upon the issue of facts as to whether petitioner made the settlement.

Mytton v. *Ry.* 211 S. W. 111.
Quiescenberry v. *Steward*, 219 S. W. 625.
Webster v. *Webster Estate*, 189 S. W. 608.

IX.

In any event having accepted the benefits of the settlement by preparing and filing the stipulation to dismiss (R., p. 48) the petitioner could not be heard by the Missouri courts, nor by this court, to urge that it did not make the settlement.

Wilson v. St. Joseph & Grand Island Ry. Co., 211 S. W. 897.
Reed v. John Gill & Sons, 201 Mo. App. 457, 459.

X.

In order for respondent to recover it was not necessary that any suit or action whatever should have been pending between Bessie G. Welker, Administratrix, and the Wabash Railway Company, at the time the settlement was made. Whether notice of the attorney's contract has been served upon the opposing party, the rights of the attorney cannot be affected by any settlement, "either before or after suit is brought" and any defendant or "proposed defendant," who settles with the attorney's client after notice has been served is liable to the attorney for the attorney's lien upon the "proceeds of such settlement."

Revised Statutes Mo. 1919, Sec. 691.

XI.

The dissenting opinion of Judge Trimble is based upon a misconception of the record. It states that the settlement was made by the Director General, notwithstanding the trial court found the issue on that question to the contrary and that this finding was conclusive upon Presiing Judge Trimble and the Kansas City Court of Appeals.

ARGUMENT.

As it was not impossible that Mr. Stepp, the person upon whom the sheriff's service of the notice of respondent's lien and service of the summons in the suit by the administratrix against petitioner was made, was the agent of the petitioner (*Vicksburg S. & P. Ry. Co.* v. *Anderson-Tully Co.*, 256 U. S. 408; *Anderson-Tully Co.* v. *Railway*, 261 Fed. 741; *Hite* v. *Ry. Co.*, 225 S. W. 916), the sheriff's return of service was conclusive on the Missouri courts and on the parties.

The question is foreclosed by the decision of the Supreme Court in *Smoot* v. *Judd*, 184 Mo. 508, and by a long line of Missouri decisions, holding that:

> "Ever since the decision of this court in *Hallowell* v. *Page*, 24 Mo. 590, the law has been uniformly declared in this state to be that 'the return of a sheriff on process, regular on its face, and showing the fact and mode of service, is conclusive upon the parties to the suit. Its truth can be controverted only in a direct action against the sheriff for false return.'"

The court further specifically approved the decision of the Supreme Court in *Bank* v. *Scuman*, 79 Mo., l. c. 532, holding that parol evidence was inadmissible in aid or support of the return or against it.

The cases cited by appellant under its third point are applicable to different issues and circumstances from those before the court in this case, and hence they have no application.

In a well-reasoned decision by the United States Circuit Court of Appeals for the Fifth Circuit, in *Vicksburg, S. & P. Railway Co.* v. *Anderson Tully Co.*, 261 Fed. 741, the concrete question is settled. That suit was brought against a railway company while it was under federal control. The contention was made that this could not be done. Said the court:

> "It is contended that the defendant, the Vicksburg, Shreveport & Pacific Railway Company, was not properly served. The return of the marshal is that the summons was: 'Executed by handing a true copy of this summons and petition for judgment to Austin King, freight agent for the V. S. & P. R. R. Co., Vicksburg, Miss., December 4, 1919.'
>
> Plaintiff in error contends that the defendant railroad was then in government operation and control, of which the courts take judicial notice, and hence that the person served was an employee of the government and not an agent of the carrier. The return is to the effect that, at the time of service, the person to whom the copy was handed was an agent of the defendant railroad. The return, so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employee of the government did not necessarily prevent his being also and at the same time an agent of the carrier, for the transaction of its business."

This court in *Vicksburg S. & P. Ry. Co., et al. v. Anderson Tully Company*, 256 U. S. 408, is in accord with the foregoing. It is there said:

> "—the return of the marshal was properly accepted by both lower courts as conclusive. He may not have been in the employ of the Director General of Railroads at all and *it was entirely possible for him to have been serving as agent for both the director and the company.*"

and the sheriff's return would have been conclusive, even if it were false, since there was no fraud alleged or proven. (*Miedreich v. Lauenstin*, 232 U. S. 236). In that case it is said:

> "In a case of this character the law must have in view not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved."

But the fact that petitioner, by its counsel, appeared and filed a stipulation for dismissal, which recited that the subject matter of the cause had "been fully settled between *the parties* thereto" (R., p. 27), demonstrated that petitioner for the purpose of obtaining advantage of the settlement *judicially admitted* that it was not a moribund entity, but that it was fully alive and was sensitive to the effect of the many decisions of the state

and federal courts holding railway companies liable to persons under circumstances similar to those detailed in the petition of *Bessie Welker, Administratrix, v. Wabash Railway Co.* (R., pp. 24-26). Among those decisions was one by the Missouri court expressly holding the railway company liable to an employee for injuries sustained while he was working for the Director General of Railroads (*Hite v. Railway Co.*, 225 S. W. 916).

The original opinion of the Court of Appeals, as well as the opinion on the motion for rehearing, demonstrates that the liability of the petitioner corporation was not based upon any act or omission of the Director General, but was based upon its own act in entering its appearance and in filing a stipulation to dismiss a suit filed against it in good faith and upon a cause of action which the Supreme Court of Missouri and the courts of many other states, as well as the Federal courts, had held was valid, which stipulation recited that defendant corporation had settled same and was taking advantage of settlement made for its benefit, by dismissing the suit.

This is shown by the opinion wherein it is said:

> "We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in view of the Federal Control Act and his order No. 50, as the facts in this case show that the administratrix had at least a *bona fide* dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the

suit may not be successfully prosecuted against the railway company instead of the Director General of Railroads. There is no contention that the administratrix did not have a good cause of action from the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts, together with the further fact that a suit was pending at the time of the compromise, show that there was a sufficient consideration for the settlement. 12 C. J., pp. 324, 326, 327; *Livingston* v. *Dugan*, 20 Mo. 102; *Wood* v. *Telephone Co.*, 223 Mo. 537, 565, 123 S. W. 6. There was not only sufficient consideration for the settlement, but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover, to show that the claim was a valid one in the sense that claimant be able to recover on it. 12 C. J., pp. 329, 330. This renders it unnecessary for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover."

On rehearing the Court of Appeals had before it the identical question presented to this court, and had before it all the authorities, together with the decision of the Supreme Court of Missouri in *Adams* v. *Railway Co.*, 229 S. W. 790, where the Supreme Court of that state holds that the railway company is not liable for the acts of those em-

ployed in the railroad service during Federal control. The Court of Appeals in the opinion herein recognized this as the law, and said on motion for rehearing:

> "We were careful in the opinion to say, 'We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General,' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a *bona fide* doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.
>
> The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite* v. *Ry.*, *supra*; *Postal Telegraph Co.* v. *Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen* v. *L. V. R. Co.* (D. C.), 255 Fed. 795; *Johnson* v. *McAdoo* (D. C.), 257 Fed. 757; *Witherspoon* v. *Postal, etc., Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed. 863; *Dampskibs* v. *Hustis* (D. C.), 257 Fed. 862; *Lavalle* v. *N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan* v. *McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo* v. *N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist* v. *M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor* v. *G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke* v. *C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W.

701; *M. P. R. Co.* v. *Ault*, 140 Ark. 572, 216 S. W.3; *Lancaster* v. *Keebler* (Tex. Civ. App.), 217 S. W. 1117; *Clapp* v. *Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens* v. *Hines*, 78 N. C. 325, 100 S. E. 617."

The principle which the Court of Appeals applied in holding the defendant liable was merely in accordance with the common law rule outlined by Anson in his ancient work on Contracts, pages 75 to 77:

> "Compromise of Suits.—The commonest form in which a forbearance appears as consideration for a promise is in the compromise of an action. A, the plaintiff, promises X, the defendant, that in consideration of certain things to be done by X he will forbear to prosecute his suit; and this is good consideration for the act or promise of X. But here, in order to make the forbearance a consideration, the plaintiff must believe in his case. In *Wade* v. *Simcon* it was held that forbearance to proceed in an action knowingly brought without cause is no consideration for a promise.
>
> Plaintiff must believe in his case. Therefor the plaintiff must believe that he has a case, and must intend *bona fide* to maintain it by action. If he does so, the fact that he has in truth no cause of action, and that the defendant knows that he has none, will not invalidate a compromise, whether made before or after the commencement of litigation. Where a man was threatened with legal proceedings because the plaintiff believed that he was liable, and he, though he knew that he

> was not liable, gave promissory notes to avoid being sued, was held to be bound by his promise. The plaintiff had abandoned a claim which he believed to be enforceable, and meant to try and enforce; the defendant escaped the inconvenience and anxieties of litigation, and the compromise was deemed to be a sufficient consideration for the notes. In a later case the law upon the subject is thus stated by Cockburn, C. J.: 'If a man *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it. In that case his conduct would be fraudulent.'"

The act of the petitioner in judicially admitting that it had settled the suit of the administratrix was a judicial admission binding on the trial court. Even had the petitioner not made the settlement, but had it been made by the Director General, yet under the Missouri decisions construing the Attorney's Lien Act, a pure question of local law, its adoption of the settlement by preparing and filing a stipulation for dismissal required the trial court to find petitioner liable to respondent. The record entry of the Circuit Court

for Livingston County showing that the petitioner filed the stipulation for dismissal is as follows:

> "First Day, January Term, Monday, Jan. 6, 1919.
>
> No. 22737.
>
> Bessie G. Welker, Admrx., Plaintiff,
>
> vs.
>
> Wabash Ry. Co., Defendant.
>
> Stipulation for dismissal filed by defendant, through its counsel." (R., p. 27.)

The Missouri Appellate Court had theretofore held that the act of a railway company in accepting the benefit of a settlement made without its knowledge by drawing up and filing a stipulation dismissing the cause rendered it liable under the Attorney's Lien Act.

In *Wilson* v. *Railway Co.*, 211 S. W. 897, the defendant notified the New York Central Railroad Company of the suit, that it would be held liable if a judgment was rendered. The New York Central Railroad settled the suit without the knowledge of the defendant. The defendant sought to escape, as the appellant here seeks to escape, by asserting that it did not make the settlement, but this court said:

> "After defendant was notified that the claim had been settled at the request of plaintiff, it drew up a stipulation to the effect that this suit should be dismissed, which was signed by plaintiff and filed for plaintiff by this defendant.
>
> It seems plain to us that, if the New York Central was not acting as defendant's agent

from the very time that the question of adjustment was first broached, defendant certainly ratified the act of the New York Central in settling the case; this because defendant consented to the settlement by drawing up and filing the stipulation dismissing the cause as a result of the settlement. Defendant was the initial carrier, and was liable to plaintiff if his claim was good, and the settlement that was made was for its benefit as well as that of the New York Central, and when defendant accepted the settlement and the benefits accruing thereunder it ratified the act of the New York Central in making the settlement. This state of facts was properly proved under movant's motion alleging that defendant settled the case."

The decision of the Circuit Court of Livingston County and of the Kansas City Court of Appeals is therefore a decision in accordance with the long line of decisions construing the Missouri Attorney's Lien Act, and which was purely a question of local law and therefore the question presented is not properly reviewable by this court.

Furthermore, the opinion of the Court of Appeals might be further justified by an examination of Section 691, R. S. Mo. 1919, which provides that the attorney after notice served has a lien on the *proceeds of the settlement*. Under the decisions of the Missouri courts, the petitioner in settling the case and agreeing to pay the respondent's attorney fee was a settlement of the case for twice the amount paid by it to the adminisratrix

and therefore one-half of the proceeds of the settlement remained in the hands of the petitioner, to which respondent's lien attached. That was the issue presented to the trial court, and its decision on this question of fact was conclusive on the Court of Appeals (*Mytton* v. *Ry.*, 211 S. W. 111) and upon this court. The foregoing facts do not present any question of Federal law.

The liability fastened upon petitioner was that arising out of its own act in settling a case and retaining one-half of the proceeds of the settlement in violation of the Missouri Attorney's Lien Act and said liability did not arise out of any act of the Director General and therefore none of the orders of the Director General could affect the right of the respondent to recover against the defendant.

Though unnecessary to support the judgment in favor of respondent, the Circuit Court of Livingston County, Missouri, had jurisdiction of the defendant in the case of *Welker, Administratrix*, plaintiff v. *Wabash Railway Company*, defendant, in which the settlement or compromise was made. There is nothing in the Federal Control Act, or any order issued thereunder to even suggest that the carrier companies passed completely out of existence, or lost their corporate entities. The return of the sheriff conclusively shows that the Wabash Railway Company was duly served with process in Livingston County, Missouri. This gave the court jurisdiction of that company. Even though orders No. 18 and 18-a of the Director General of Railroads did deprive Bessie G. Wel-

ker, Administratrix, of her right to prosecute her action in the Circuit Court of Livingston County, Missouri. That was a matter to be raised by demurrer or plead in bar of her action and did not deprive the court of jurisdiction over the defendant.

II.

In conclusion we reiterate that three well defined reasons stand in the way of review by this court:

I. Absence of a federal question.

II. The decision of the Kansas City Court of Appeals rests on an independent principle of non-federal law.

III. Clear and palpable error on the part of the state court does not appear.

I.

It is essential to the jurisdiction of this court that it shall appear that a federal question is involved; that it was raised in and presented to the state court and that the decision was against the right claimed; that the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case; or that there has been no decision by the state court of any other matter or issue sufficient

to maintain the judgment of that court without regard to the federal question.

Murdock v. *Memphis*, 20 Wall. 590-642.

The existence of jurisdiction to review under these principles depends not merely upon form, but upon substance.

Seaboard Air Line v. *Padgett*, 236 U. S. 671.

To express it more clearly we quote from *Western Union Teleg. Co.* v. *Wilson*, 213 U. S. 52, on page 53:

> "This case comes here from a state court, and, of course, therefore it must appear that a federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *De-Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300; *Leathe* v. *Thomas*, 207 U. S. 93, 99; see also *Batchel* v. *Wilson*, 204 U. S. 36."

II.

The decision of the Kansas City Court of Appeals is based upon an independent principle of general law which eliminates liability upon the part of the defendant for the acts of the Director General of Railroads, thus excluding a federal question. Therefore, the consideration of a federal question was not necessary to the court's decision.

Petitioner does not gainsay this proposition, but claims that the Kansas City Court of Appeals missed the point at issue. We think that it hit the point at issue, but it makes no difference whether it did or not. Its decision in the case was a decision on a non-federal question and this court will not review it. That is to say, its decision was upon the question: When a suit is pending, and is asserted in good faith, in a court of general jurisdiction, against a defendant who appears in that court, and that defendant makes a settlement of the claim and pays one-half thereof and files a stipulation to dismiss the suit, does the settlement of the claim and the stipulation to dismiss make it liable under the general principles of law under Section 691, R. S. Mo. 1919, to respondent for the other half? Certainly, this is not a federal question. As was said in the case of *Murdock* v. *Memphis*, 20 Wall. 642, l. c. 638:

> "The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of

> the United States. *Whether decided well or otherwise by the State Court, we have no authority to inquire.*"

The Kansas City Court of Appeals had the right to apply the general principles of law enunciated by the Supreme Court of the state in *Livingston* v. *Dugan*, 20 Mo. 102; *Wood* v. *Telephone Co.*, 223 Mo. 537; 12 C. J. 324, 326, 327.

This court, in the following cases, has expressly recognized the application of the principle that the settlement of a *bona fide* dispute or doubtful claim is binding upon the parties and the courts, and that when a trial court refuses to give effect to such settlement, as did the Kansas City Court of Appeals give effect herein, it fails to give effect to a controlling principle of general law.

> *San Juan* v. *St. John's Gas Co.*, 195 U. S. 510.
> *Fire Ins. Assn., Ltd.*, v. *Wickham*, 141 U. S. 564.
> *Hennessy* v. *Bacon*, 137 U. S. 78.
> *Bofinger* v. *Tuyes*, 120 U. S. 198.
> *Northern Liberty Market Co.* v. *Kelly*, 113 U. S. 199.
> *Jeffries* v. *New York Mut. L. Ins. Co.*, 110 U. S. 305.
> *St. Louis* v. *U. S.*, 92 U. S. 462.
> *U. S.* v. *Child*, 12 Wall. 232.
> *Union Bank* v. *Geary*, 5 Pet. 99.

Though on a general principle of non-federal law, we would add that the dissenting opinion of Judge Trimble, of the Kansas City Court of Appeals, which petitioner quotes at length, utterly

ignores the fact that upon the disputed issue as to who made the settlement, the trial court, sitting as a jury, *found that the settlement was in fact made by defendant Wabash Railway Company.* There is no principle more firmly established by the courts of Missouri than that the finding of the trial court on disputed questions of fact is binding on, and cannot be disturbed by, the appellate courts. Cases without number so holding could be cited, but we will content ourselves with the citation of only a few of the recent authorities:

Quisenberry v. *Stewart*, 219 S. W. 625.
Webster v. *Webster's Estate*, 189 S. W. 608.
Shelton v. *Railway*, 190 S. W. 46.
Russell Grain Co. v. *Bainter*, 223 S. W. 769.

To show that the trial court had before it substantial evidence on which to base its finding, approved by the Missouri appellate courts, that defendant Wabash Railway Company made the settlement, we have only to quote the stipulation signed and filed by such defendant (see Petitioner's Record, p. 27):

"In the Circuit Court of Livingston County, Missouri. To the ..... Term, 1918.
Bessie G. Welker, Administratrix,
Estate of Mern G. Welker, deceased,
vs.
Wabash Railway Company.

The subject matter of the above entitled *suit* having been fully *settled between the parties hereto*, it is hereby stipulated and

agreed that said suit be dismissed at defendant's cost.

(Signed) BESSIE G. WELKER,
Administratrix, etc., *Plaintiff.*
WABASH RAILWAY COMPANY,
Defendant.
By C. G. WILLIAMSON,
Its Counsel."

Bearing in mind that at the time this stipulation was signed and filed by the Wabash Railway Company, it and the plaintiff administratrix were the only parties to the suit, the recitation of the "*suit having been fully settled between* the parties hereto" is and can be nothing but the written, signed statement of the Wabash Railway Company that it had made the settlement. Men have been convicted of grave crimes on statements far less solemn.

It is immaterial that the decision of this court in *Mo. Pac. R. R. Co. v. Ault*, or the decision of the Supreme Court of Missouri in the Adams case rendered long after the settlement was made, shows the rights of the parties to have been different from what they at the time supposed. *Hennessey v. Bacon*, 137 U. S. 78; *Mills County v. Burlington Ry. Co.*, 107 U. S. 557. In other words, it is not necessary to sustain a compromise of a doubtful right that the parties shall have settled the controversy as the law would have done. It is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that at the time of

the compromise they, in good faith, so considered it. *Kiefer Oil Co. v. McDougal*, 229 Fed. 933; *Long v. Towl*, 42 Mo. 545.

To sustain the contention of the petitioner, this court would find it necessary to overturn the well established principles of general law recognized by this court and the Supreme Court of Missouri and applied by the Kansas City Court of Appeals. For the reasons given the writ should be denied.

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